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ADVICE TO LAW CLERKS: HOW TO DRAFT YOUR FIRST JUDICIAL OPINION

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INTRODUCTION

You just got a job clerking, interning, or externing for a judge. Among your other responsibilities will be to draft your first judicial opinion.¹ If legal writing is the hardest of the legal arts to master, judicial-opinion writing is the hardest of the legal-writing arts.² The court needs to get the decision right and for the right reasons. The task is difficult to handle without guidance.³ This article tries to demystify the task of drafting a credible, dignified, and impartial judicial opinion.

The entire adjudicative function and decision-making process is entrusted to the judge alone.⁴ Nonetheless, judges often assign their clerks to write the first drafts of their opinions.⁵ Clerks generally have good writing skills, but opinion writing requires a particular style, tone, and organization. No matter how flawless your legal analysis or how well you write, expect the judge to edit your draft until it looks and reads like the judge's own handiwork. Do not take the edits personally or let your ego interfere. Learning to emulate the judge's writing style will make you a better clerk, as you will facilitate the judge's editing task and make the editing more efficient.⁶

A judicial opinion is a "statement of reasons explaining why and how the decision was reached and providing the authorities upon which the decision relies."⁷ The primary purpose of an opinion is to give the parties the reasons that justify the court's outcome.⁸ Judicial opinions are persuasive writing.

Judges write opinions for many reasons: to help think through the issues;⁹ to explain to the parties, their counsel, and the appellate courts how and why the case was decided; to advance the law's development; to provide consistency by setting precedent;¹⁰ to show the public that judges are doing their job; to teach the law to students and the public; and to convince a possibly unfavorable audience that the judge wrote a correct decision. Opinions are the principal way judges communicate with society.¹¹ Opinions must not merely withstand criticism, they must also promote *30 respect for the courts and the administration of justice.

This article is divided into four sections. The first offers ideas on how to understand the case before putting pen to paper. The second discusses the drafting process. The third suggests how to review the draft to improve it. The fourth gives some pointers on what to do and what to avoid in opinion writing.

UNDERSTANDING THE CASE

The first thing to do when the judge assigns your first opinion to you is to make sure you understand the case. This implies becoming familiar with the facts, the procedural history, the issues, the standard of review, the applicable law, and how the case must be resolved. Only when you fully understand the case will you be able to start drafting.

To understand the case, review the parties' submissions and identify the issues in dispute. Sometimes the parties will have correctly identified the issues in their briefs. Other times you will find other issues that must be resolved or that the parties stated the issues incorrectly. Ascertain the issues yourself.

Once you have identified the issues, determine why the case is before the court and whether the court has jurisdiction, as "without jurisdiction to hear the case, an opinion stands on very shaky ground."¹² Next, identify the procedural posture and what relief the parties seek.

Then familiarize yourself with the relevant facts. A fact is relevant if it will affect the analysis and the decision. Do not get lost in every factual detail. Take notes or create timelines to recall the facts.

Next, determine what standard of review or burden of proof the court will need to apply to the case. At the trial level, the standard of review is the test the court uses to decide a motion. At the appellate level, the standard of review is the level of deference with which the appellate court will review the trial court's decision. At either level, the standard of review or the burden of proof is the lens through which the law applies to the facts.

Move on to the applicable law. Do not rely only on the law the parties cited. Do your own research to verify that the authorities on which you might rely are good law. It is sloppy when a lawyer cites bad law, but a judge who cites bad law will render a bad opinion.

Regardless of whether the judge has told you how to resolve the case or whether you are left on your own to suggest an outcome, review everything with an eye toward recommending and supporting a conclusion with which you are comfortable.

Once you review the facts, ascertain the standard of review, study the law and arrive at a conclusion, you should have a rough idea how the opinion should be laid out. Even so, if the opinion will be longer than two or three pages, you will not be able to draft it clearly and efficiently unless you create an outline first. Outlining is an investment in organization and readability.¹³ Outlining organizes thoughts, identifies ³¹ shortcomings and is efficient. It takes less time to outline than to repair an unclear draft later.

Once you have an outline, discuss the case with the judge or, if you are an intern or extern, with the judge's law clerk. Doing so will save time and effort. The conversation might begin like this: "This is a car-accident case. The defendant moves for summary judgment seeking dismissal. The defendant raises two points. As to the first point, the defendant argues xx, while the plaintiff argues yy. As to the second point, the defendant argues xx, while the plaintiff argues yy. I recommend that the plaintiff win because yy."

DRAFTING THE OPINION

Once you understand the case and the judge approves your outline, you are ready to start writing. It will be helpful to read some of the judge's earlier opinions to give you a template and help you mimic the judge's style and organization. Although different opinion writing styles abound¹⁴ and no two opinions are alike (unless the opinion is simple boilerplate), judges often have a traditional style that follows this order: caption, introduction, statement or findings of facts, statement of issues, legal analysis or conclusions of law, and conclusion.¹⁵

The caption identifies the case by including the court's name, the docket number, the parties' names, the judge's name, and the title of the document, such as "Order and Opinion."

The introduction or opening paragraph in a traditional opinion should tell the reader in a few seconds the essentials of the case: what the case is about; who the parties are; and, often, what the outcome is.¹⁶ If you can draft an opening paragraph that gives all this information succinctly and concisely, writing the rest of the opinion will be easier. The most common technique is to introduce the action and the litigants, write the most essential procedural history and facts, formulate the issue in general terms, and give a brief answer. The goal is to "combine the procedure, the facts, the issue and the answer to the issue in one fell swoop."¹⁷ Investing the time coming up with a good introduction will improve your opinion's readability and will be time well spent.

State the relevant facts. Get the facts directly from the record to be certain of their accuracy: "An opinion writer is entitled to the greatest leeway both in his law and in his reasoning, for they are his. But honesty allows no leeway in his statement of facts, for they are not his."¹⁸ Tell the facts impartially to show fairness in the court's consideration of the case.¹⁹ In using impartial, accurate facts, consider the losing side's facts and resolve issues of credibility. Tell your facts with specificity, not conclusions. Do not parrot the record witness by witness. Use emotional themes without writing emotionally. That involves understatement, a writing device linked not only to persuasion but also to integrity.

If possible, state the facts chronologically; the natural sequence of events will engage the reader. Only if a chronological narration is confusing -- for example, if there are several claims or counterclaims -- should you choose a thematic order. ³² Facts can also be ordered by importance, but that will make it difficult to create an easy-to-follow sequence. Do not copy a litigant's rendition of the facts. Doing so suggests a lack of independent thought and cuts against the perception of impartiality, fairness, and integrity.²⁰

Once you have stated the facts of the case, mention the issues the court will address. Judicial opinions should resolve only the

claims and issues before the court. Avoid wandering off on hypotheticals or addressing issues that go beyond resolving the case. Doing so will lead readers to incorrect interpretations and unwelcome *dicta*.

When you phrase your issues, do so neutrally. The opinion will show bias if, in simply stating the issue, the court favors one side over the other. Then blend law and fact so that answering each issue resolves that part of the case. Address the issues by logical order, by a threshold issue that takes precedence over the merits, or by the order of greatest importance to the conclusion and not necessarily in the order the parties laid them out. Follow that order when you analyze the issues.

As soon as you list the issues, analyze them. Legal analysis requires applying the law to the facts. The standard of review or burden of proof will give you the framework for your analysis; state the standard or burden before you engage in a detailed analysis of each issue. A short opinion will not require headings, but longer or more intricate opinions might be more difficult to follow if topics are not divided up by headings. Consider headings, written neutrally, to keep you and the reader on track. The complexity of the facts and the nature of the legal issues will determine the depth of the analysis of facts and law. Shape the opinion accordingly.²¹

The most important thing the opinion must do is “state plainly the rule upon which the decision proceeds. This is required in theory because the court’s function is to declare the law and in practice because the bar is entitled to know exactly what rule it can follow in advising clients and in trying cases.”²² Give the real reasons for the decision -- candor reveals integrity. Do not reveal personal thoughts in the guise of candor. An opinion resolves issues and should not be a vehicle for introspection or self-congratulation²³

Large block quotations go unread. Do not use them unless the court must interpret a statute or contract or is relying on key language from a seminal case. Instead, analyze the facts of the case, apply the law, and explain why the decision is justified. Like boilerplate opinions, which suggest that different cases were not analyzed differently, block quotations signal laziness and a lack of analysis. This is disrespectful to the case, the parties, and the judicial function.²⁴

Avoid metadiscourse. Metadiscourse, the antithesis of concision, consists of announcing what the writer plans to write. Examples of metadiscourse: “after careful consideration,” “having read all the papers, the court concludes that,” “it is well-settled that,” or “it is hornbook law that.” Opinions should get to the point and consider the facts and law carefully without saying how well they were researched or how seriously they were considered. Metadiscourse is condescending and pedantic.²⁵

*³³ Some judges like to include a closing paragraph after each issue has been analyzed. It is a final opportunity to restate and summarize the holding. If your judge follows this format, do not repeat all the information you have already given.

Conclude by stating the court’s holding clearly. An opinion explains the reasons for the outcome of the case. Close the opinion with the decision.²⁶ The description that the court makes of its own holding will communicate the scope of the decision and set the opinion’s precedential status.²⁷

Once you have a complete draft, be ready to start reviewing. The judge will expect your best product to start the collaborative effort of editing the opinion. Your goal is to craft a judicial opinion that is respectful, well-reasoned, factually honest and carefully written. Opinions must encourage public respect for the judiciary and acceptance of its opinions.²⁸

EDITING AND PROOFREADING

The revision process is designed to help your reader understand the opinion. Reviewing an opinion is time consuming and requires concentration, dedication, patience, and thoroughness.

To begin, make sure you are in the right state of mind, one that will allow you to evaluate your work and make edits to improve it. An effective way to get started is to put your work aside for a few hours, or even days, between drafts. Start the project early and leave time to reflect.

Editing and proofreading are the twin parts of revision. Editing corrects largescale problems like content, organization, and reasoning. Proofreading corrects minutia like typographical errors, grammar, citations and format. Both aspects are crucial in producing a final product that is professional, easy to read and effective -- an opinion worthy of having been produced by your judge.

You might want to start the editing stage by testing your draft to improve readability. You are looking to find ways to improve coherence, structure, and style. Reread the opinion a few times all the way through. This simple exercise will locate structural shortcomings or inconsistencies in style. If you find problems, create a new version of the document and come up with a better result. Having this new version allows you to return to the original version if you ever find that the new version

does not improve the opinion.

If, after reading the opinion, you find no further room for improvement, ask yourself whether the introduction gives the reader a succinct understanding of the parties, why their dispute is before the court, what the relevant facts are and whether the conclusion is justified by what precedes it. Then go to the closing paragraph to make it consistent with the introduction. Make sure, also, that your statement of facts addresses all the facts that impact the conclusion and which are discussed in the legal analysis.²⁹ To justify the judge's decision and reinforce the appearance of a fair and impartial opinion, be sure that the opinion discusses the losing side's important facts and arguments.³⁰

***34** Next, make sure that the opinion is written in a style that allows the reader to understand the opinion and which uses simple words written in plain English. Your "objective is not a literary gem but a useful precedent, and the opinion should be constructed with good words, not plastered with them."³¹

Some divide proofreading into stages. You can read the text once to correct grammar and syntax, then to correct spelling and typographical errors, then to verify citations and quotations and finish by formatting the document correctly. As you become more experienced, you will notice your weaknesses and come up with your own ways to edit and proofread, perhaps by focusing on small things first, perhaps by focusing on large things first.

If a concept can characterize the reviewing stage, it would be thoroughness. Review your work with attention to detail. A judicial opinion must not look unprofessional.

The opinion must be clear, concise, and precise. Do not overwrite or draft treatise-like opinions -- something done by inexperienced law clerks who lack the confidence to distinguish between the important and the trivial - between the settled and the novel. If you understand the case, you will know what the relevant facts and law are and you will not include irrelevant information or discuss basic concepts ad nauseam. A short opinion that cuts to the chase and provides only the necessary support for the conclusion is more easily understood.³²

Decisions, orders, decrees, and judgments must be understood if they are to be obeyed. You achieve this by using simple words that convey the meaning you desire; short sentences together with transitions; paragraphs that address one subject at a time; and only the words needed to convey each thought. Be sure to review each paragraph individually and in context. Reading the text aloud or reading it backwards can be helpful at this stage as well as spelling and grammar checkers.

Once you finish your review, do not ask someone outside the court system to critique your draft. Another pair of eyes will offer insights on how to improve it, but confidentiality concerns require that the opinion remain in chambers, never to be discussed elsewhere. No one but a judge, a member of the judge's staff or law clerk from the court's pool may draft or review an opinion.³³

Once you have come up with your best product, hand in your draft and be prepared to continue working on it through a sequence of edits and redrafts until the judge approves the opinion. Take the editing as a learning experience and as a way to improve the opinion, not as a personal affront. Internalize the view that decision-making remains exclusively with the judge. The judge alone is responsible for its content. Thus, the judge should not give you credit for your assistance. That could lead a reader to question whether the judge or someone else decided the case.³⁴

There are many lists of do's and don'ts in opinion writing. For reference, we include some of the more important.

***35 USEFUL DO'S AND DON'TS**

Consider these suggestions when writing judicial opinions:

1. Avoid legalese like "thereinafter," "hereinafter," "said," "such," and "before mentioned." Write in plain English.
2. Do not use Latin words or phrases if you have an English equivalent.
3. Use common Anglo Saxon words. Use short synonyms for long words.
4. Never use sexist language. Gender-neutral opinions project fairness.
5. Limit citations to the necessary sources. Cite only what you use and use only what you cite.
6. Add pinpoint or jump citations for every case or secondary authority you cite.
7. Avoid string citations if possible.

8. Avoid footnotes except for citations or collateral thoughts.
9. Never use sarcasm, humor or condescending language.³⁵ Avoid references to popular culture.³⁶
10. Avoid personal attacks or the appearance of bias or impropriety.
11. Do not be defensive.
12. Do not address everything. Discuss only the relevant facts and law.
13. Address arguments, not parties; and address parties, not their lawyers.
14. Refer to the parties consistently throughout the opinion.
15. Use Bluebook citations if you are a federal judge's clerk, intern, or extern. Use *New York Official Reports Style Manual*, nicknamed the "Tanbook,"³⁷ if you work for a New York State judge.
16. Avoid unnecessary detail when discussing facts and law.
17. Be honest and accurate in the facts and law. Understate. Never exaggerate.
18. Write in the positive, not in the negative.
19. Eliminate the passive voice and nominalizations.
20. Be organized: Say it once, all in one place.
21. Avoid italics, underlining or quotation marks to emphasize.
22. Make your opinion easy to read.
23. Stress content, not style.
24. Be definitive, not cowardly or tentative.
25. Decide the case quickly.

CONCLUSION

We hope these notes are helpful for your opinion writing. As with everything else, you will improve over time and with experience. After working collaboratively and reediting your draft with your judge, your opinions will acquire a form and content of which you will be proud. Good luck, and enjoy your progress.

Footnotes

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- 1 Other writing tasks include bench memorandums. For a guide on how to write bench memorandums, see ALVIN B. RUBIN & LAURA B. BARTELL, *LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES* 143-44 (Fed. Jud. Ctr. rev. ed. 1989).
- 2 RUGGERO J. ALDISERT, *OPINION WRITING* 22 (1990). Judge Aldisert's text is expected to be released soon in a second edition.

- 3 See Gerald J. Clark, *Supervising Judicial Interns: A Primer*, 36 SUFFOLK U. L. REV. 681 (2003) (describing educational value of judicial internships).
- 4 Judge Aldisert gives this advice to his clerks: “You were not selected by me to be a ‘yes man.’ [Yet] when the decision is in, that is it.” Ruggero J. Aldisert, *Duties of Law Clerks*, 26 VAND. L. REV. 1251, 1256-57 (1973).
- 5 Jeffrey O. Cooper & Douglas A. Bermann, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOKLYN L. REV. 685, 697 (2001). For more on using law clerks to help draft opinions, see David Crump, *How Judges Use Their Law Clerks*, 58 N.Y. ST. B.J. 43 (1986); Sean Donahue, *Behind the Pillars of Justice: Remarks on Law Clerks*, 3 LONG TERM VIEW 77 (1995); Nicholas Johnson, *What DO Law Clerks Do?*, 22 TEX B.J. 229 (1959); Kermit Lipez, *Judges and Their Law Clerks: Some Reflections*, 22 ME. B.J. 112 (2007); J. Daniel Mahoney, *Law Clerks: For Better or Worse*, 54 BROOKLYN L. REV. 321 (1988); George Rose Smith, *A Primer of Opinion Writing for Law Clerks*, 26 VAND. L. REV. 1203 (1973). A survey conducted to determine the percentage of federal district law clerks who draft judicial opinions showed that 303 of the 311 respondent federal judges assign that responsibility to their law clerks. Todd C. Peppers, Giles, Micheal W. and Tainer-Parkins, Bridget, *The Hiring and Utilization of Federal District Court Law Clerks* 17 (Oct. 2007). Available at SSRN: <http://ssrn.com/abstract=1022623> (last visited Mar. 31, 2009).
- 6 Gerald Lebovits, *Judges’ Clerks Play Varied Roles in the Opinion Drafting Process*, 76 N.Y. ST. B.J. 34, 34 (July/Aug. 2004).
- 7 Jennifer Sheppard, *The “Write” Way: A Judicial Clerk’s Guide to Writing for the Court*, 38 U. BAL. L. REV. 73, 75 (2008).
- 8 Opinion Writing, *supra* note 2, at 22.
- 9 BRYAN A. GARNER et al., *THE REDBOOK: A MANUAL ON LEGAL STYLE* § 23.1(a), at 435 (2d ed. 2006).
- 10 John B. Nesbitt, *The Role of Trial Court Opinions in the Judicial Process*, 75 N.Y. ST. B.J. 39, 40 (Sept. 2003).
- 11 Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 812 (1961).
- 12 Aldisert, Ruggero J., Rasch, Mehan and Bartlett, Matthew P., *Opinion Writing and Opinion Readers* 36 (Mar. 16, 2009). Available at SSRN: <http://ssrn.com/abstract=1361161> (last visited Apr. 2, 2009).
- 13 Richard B. Klein, *Opinion Writing Assistance Involving Law Clerks: What I Tell Them*, 34 JUDGES’ J. 33, 35 (1995).
- 14 For a discussion of different opinion writing styles, see Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421 (1995).
- 15 Different authors use different names to refer to an opinion’s substantive parts. Judge Aldisert calls them the opening paragraph, the summary of issues discussed, the material or adjudicative facts, the litigants’ analysis of the issues, and the conclusion. See Opinion Writing and Opinion Readers, *supra* note 12, at 32.
- 16 Gerald Lebovits, *Advanced Judicial Opinion Writing: A Handbook for New York State Trial and Appellate Courts* 54 (N.Y. St. Unif. Ct. Sys. 7.4 ed. Dec. 2004).
- 17 Sheppard, *supra* note 7, at 75.
- 18 Moses Lasky, *A Return to the Observatory Below the Bench*, 19 Sw. L.J. 679, 689 (1965).

- 19 Am. Bar. Ass'n Appellate Judges Conference, *Judicial Opinion Writing Manual 5* (1991).
- 20 Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 *GEO. J. LEGAL ETHICS* 237, 308 (2008).
- 21 *Judicial Writing Manual 1* (1991).
- 22 John H. Wigmore, *Evidence in Trials at Common Law § 8b*, at 624 (Peter Tillers rev. ed., 1983).
- 23 Gerald Lebovits, The Legal Writer, *Ethical Judicial Writing -- Part I*, 79 *N.Y. St. B.J.* 64, 52 (Nov./Dec. 2007).
- 24 Gerald Lebovits, *Ethical Judicial Writing -- Part III*, 79 *N.Y. St. B.J.* 64, 56 (Feb. 2007).
- 25 *Id.*
- 26 Joyce J. George, *JUDICIAL OPINION WRITING HANDBOOK 22* (4th ed. 2000).
- 27 Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 *U. CHI. L. REV.* 1371, 1398 (1995).
- 28 Nancy A. Wanderer, *Writing Better Opinions: Communicating With Candor, Clarity, and Style*, 54 *ME. L. REV.* 47, 67 (2002).
- 29 TOM GOLDSTEIN & JETHRO K. LIEBERMAN, *THE LAWYER'S GUIDE TO WRITING WELL* 155 (2d ed. 2002).
- 30 Gerald Lebovits, *Ethical Judicial Writing -- Part II*, 79 *N.Y. St. B.J.* 64, 50 (Jan. 2007).
- 31 BERNARD E. WITKIN, *MANUAL ON APPELLATE COURT OPINIONS* § 103, at 204-05 (1977).
- 32 Judith S. Kaye, *Judges As Wordsmiths*, 69 *N.Y. St. B.J.* 10, 11 (Nov. 1997).
- 33 *Matter of Fuchsberg*, 426 *N.Y.S.2d* 639, 648 (N.Y. Ct. Jud. 1978) (*per curiam*); *Matter of Judicial Disciplinary Proceedings Against Tesmer*, 580 *N.W.2d* 307, 309 (Wis. 1998) (*per curiam*).
- 34 *Parker v. Connors Steel Co.*, 855 *F.2d* 1510, 1524-25 (11th Cir. 1988).
- 35 For more on the impropriety of using humor, see George Rose Smith, *A Primer of Opinion Writing for Four New Judges*, 21 *ARK. L. REV.* 197, 210 (1967); for sarcasm, see Robert A. Leflar, *Quality in Judicial Opinions*, 3 *PACE L. REV.* 579, 584 (1983).
- 36 Witte, Ryan Benjamin, *The Judge as an Author/The Author as a Judge* (February 9, 2009). Available at SSRN: <http://ssrn.com/abstract=1339943> (last visited Mar. 31, 2009).
- 37 The Tanbook is available online. See http://www.courts.state.ny.us/reporter/New_Styman.htm (last visited Apr. 1, 2008).